Chia Foon Tau & Anor (suing as the executor of the estate of Chong Tzu Chieh, deceased) v Lim Pey Lin

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO 24-201 OF 1995
SURIYADI J
10 APRIL 1997

Partnership *— Termination — Death of partner — Entitlement to goodwill of partnership — Agreement provided that the surviving partner would not be entitled to claim any goodwill of the partnership if she ceases to be a partner — Whether surviving partner was entitled to goodwill of the partneship*

Partnership *— Partnership property — Death of partner — Entitlement to goodwill of partnership — Agreement provided that the surviving partner would not be entitled to claim any goodwill of the partnership if she ceases to be a partner — Whether surviving partner was entitled to goodwill of the partnership*

Partnership *— Termination — Death of partner — Whether the surviving partner was entitled to continue using the partnership name after the dissolution of the partnership— Partnership Act 1961 s 44*

Before 1 January 1993, Chong Tzu Chieh ('the deceased') was the sole owner of the firm TC Chong & Co. On 1 January 1993, the defendant was brought in as a business partner vide a partnership agreement ('the agreement') where she paid a sum of which was equivalent to 40% of the nett assets of the firm. On 2 March 1995, the partnership ceased due to the death of the deceased. The plaintiffs, as the executors of the estate of the deceased, applied for an injunction to restrain the defendant from carrying on the business in the style of the partnership. The plaintiffs claimed that no goodwill was payable to the defendant as cl 9 in the agreement provided that the defendant would not be entitled to claim any goodwill of the partnership if she ceases to be a partner. Clause 7 of the agreement further provided that 40% of the nett assets of the partnership as at 31 December 1992 shall be taken over by the defendant. The defendant, on the other hand, argued that the factors prior to the signing of the agreement read together with cl 9 permitted her to claim the goodwill. The plaintiffs also claimed that the defendant was not entitled to continue using the name TC Chong & Co after the dissolution of the partnership.

Held, dismissing the application:

(1) Under cl 7, the defendant was entitled to 40% of the nett assets of the firm. By virtue of the definition of nett assets, which included goodwill of the firm, the defendant was therefore entitled to the goodwill. Further to that, cl 9 provided that if the defendant were to disassociated herself from the partnership, she would not be entitled to the goodwill of the firm attained after 1 January 1993. As the facts revealed, she did none of this as the partnership was dissolved by an act of God. As a result, the defendant was

not prohibited from claiming the goodwill during her tenure as one of the partners when she had no hand in the unfortunate dissolution of the firm. Thus, as she had paid 40% of the nett assets of the firm — within which the goodwill was already enmeshed — she was therefore entitled to claim not only her fair share of the assets but also the goodwill after 1 January 1993 (see p 73C–F); *Jennings v Jennings* [1898] 1 Ch 379 followed.

(2) The agreement was silent as to whether the defendant was entitled to continue using the name of the partnership after its dissolution. Authorities showed that in the event of the dissolution of a partnership, each partner, in the absence of an agreement, was entitled to use the name of the firm. Since there was no evidence that the usage of the firm's name had jeopardized the interests of the estate or cause a diminution of the value of the assets of the firm and on the facts of this case, the defendant was entitled to continue to use the firm's name despite its dissolution. Furthermore, by the promulgation of s 44 of the Partnership Act 1961, Parliament had endorsed the right of a surviving partner to carry on using the old name, subject to the requirements provided therein (see p 75C–H); *Anna Trego & William Wilson Smith v George Stratford Hunt* [1896] AC 7, *Scott v Rowland* (1872) 20 WR 508, *Banks v Gibson* (1865) 34 Beav 566, *Burchell v Wilde* [1900] 1 Ch 551 and *Manley v Sartori* [1926] All ER 661 followed; *Re an Arbitration between David and Matthews* [1899] 1 Ch 378 not followed.

[Bahasa Malaysia summary

Sebelum 1 Januari 1993, Chong Tzu Chieh ('si mati') merupakan pemilik tunggal firma TC Chong & Co. Pada 1 Januari 1993, defendan telah menjadi rakan kongsi perniagaan tersebut melalui satu perjanjian perkongsian ('perjanjian tersebut') di mana dia telah membayar jumlah yang bersamaan dengan 40% nilai aset bersih firma tersebut. Pada 2 Mac 1995, perkongsian tersebut telah dibubarkan berikutan kematian si mati. Plaintif-plaintif, sebagai wasi harta pusaka si mati, telah memohon satu injunksi untuk melarang defendan daripada meneruskan perniagaan syarikat tersebut sebagai suatu perkongsian. Plaintif-plaintif telah memohon bahawa tidak ada pampasan untuk nama baik yang harus dibayar kepada defendan kerana fasal 9 perjanjian tersebut memperuntukkan bahawa defendan tidak berhak menuntut pampasan nama baik perkongsian tersebut jikalau dia berhenti menjadi seorang rakan kongsi. Fasal 7 perjanjian tersebut selanjutnya memperuntukkan bahawa 40% nilai aset bersih perkongsian tersebut pada 31 Disember 1992 akan diambilalih oleh defendan. Defendan pula telah berhujah bahawa faktor-faktor, sebelum menandatangani perjanjian tersebut, dibaca bersama dengan fasal 9, membenarkannya menuntut pampasan untuk nama baik tersebut. Plaintif juga telah menuntut bahawa defendan tidak berhak meneruskan perniagaan setelah pembubaran perkongsian tersebut.

Diputuskan, menolak permohonan:

(1) Di bawah fasal 7, defendan berhak mendapat 40% daripada nilai aset bersih syarikat tersebut. Mengikut tafsiran aset bersih, yang mana ianya merangkumi nama baik syarikat, maka defendan berhak terhadap nama baik syarikat. Selanjutnya, fasal 9 memperuntukkan bahawa jikalau defendan mengasingkan diri dari perkongsian tersebut, maka dia tidak akan berhak kepada nama baik firma tersebut yang diperolehi selepas 1 Januari 1993. Seperti yang diperlihatkan oleh fakta-fakta, dia tidak melakukan apa-apapun kerana perkongsian telah dibubarkan oleh bencana alam. Oleh yang demikian, defendan tidak dilarang menuntut nama baik dalam tempoh masanya sebagai salah seorang rakan kongsi kerana dia tidak terlibat langsung dalam pembubaran malang firma tersebut. Maka, oleh kerana dia telah membayar 40% nilai bersih aset firma — di mana nama baik adalah termasuk — dia adalah berhak menuntut bukan sahaja bahagian wajar aset tersebut tetapi juga nama baik syarikat selepas 1 Januari 1993 (lihat ms 73C–F); *Jennings v Jennings* [1898] 1 Ch 379 diikut.

(2) Perjanjian tersebut adalah terdiam berkenaan dengan sama ada defendan adalah berhak meneruskan nama perkongsian setelah pembubarannya. Nas-nas telah menunjukkan bahawa jikalau berlakunya pembubaran perkongsian tersebut, setiap rakan kongsi, tanpa perjanjian, adalah berhak menggunakan nama firma. Oleh kerana tidak ada keterangan bahawa penggunaan nama firma akan memudaratkan kepentingan harta pusaka ataupun menyebabkan pengurangan nilai aset firma dan berdasarkan fakta-fakta kes ini, defendan adalah berhak terus menggunakan nama firma walaupun ianya dibubarkan. Lebih-lebih lagi dengan pengisytiharan s 44 Akta Perkongsian 1961, Parlimen telah mengendorskan hak rakan kongsi yang hidup untuk terus menggunakan nama lama itu, tertakluk kepada keperluan-keperluan yang diperuntukkan (lihat ms 75C–H); *Anna Trego & William Wilson Smith v George Stratford Hunt* [1896] AC 7, *Scott v Rowland* (1872) 20 WR 508, *Banks v Gibson* (1865) 34 Beav 566, *Burchell v Wilde* [1900] 1 Ch 551 dan *Manley v Sartori* [1926] All ER diikut; *Re an Arbitration between David and Matthews* [1899] 1 Ch 378 tidak diikut.]

Notes

For cases on termination of partnership due to death of a partner, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 927–931.

For cases on partnership property, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 877–896.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] 1 All ER 504 (refd)

An Arbitration between David and Matthews, Re [1899] 1 Ch 378 (not folld)

Anna Trego & William Wilson Smith v George Stratford Hunt [1896] AC 7 (folld)
Associated Tractors Sdn Bhd v Chan Boon Heng & Anor [1990] 2 MLJ 408 (refd)
Banks v Gibson (1865) 34 Beav 566 (folld)
Burchell v Wilde [1900] 1 Ch 551 (folld)
Jennings v Jennings [1898] 1 Ch 379 (folld)
Keith Spicer Ltd v Mansell [1970] 1 All ER 462 (refd)
Khoo Yoke Wah & Ors v Lee Choo Yam Holdings Sdn Bhd & Ors [1991] 1 MLJ 414 (refd)
Levy v Walker (1879) 10 Ch 436 (refd)
Manley v Sartori [1926] All ER 661 (refd)
Scott v Rowland (1872) 20 WR 508 (folld)
Tan Eng Choong v Foo Kai Yuen & Anor [1988] 1 MLJ 531 (refd)

Legislation referred to

Partnership Act 1961 ss 35, 41

TK Kee (*Nik Hussain & Partners*) for the plaintiff.
KP Ng (*KP Ng & Amardas*) for the defendant.

Suriyadi J: The originating motion which is marked encl 2, in a gist, is an application by the plaintiffs for an injunction whereby the defendant is to cease carrying on business in the style of TC Chong & Co from the date of the court's order, other than to assist in its final winding up. TC Chong & Co began as a sole proprietorship with Chong Tzu Chieh ('the deceased') as the sole owner. For a short stint, Lim Pey Lin worked with the deceased as his assistant. On 1 January 1993 vide a partnership agreement, the defendant was brought in as a business partner thus converting the firm into a partnership. On 2 March 1995, the partnership ceased as the deceased passed away leaving the defendant as the surviving partner.

Pursuant to s 35 of the Partnership Act 1961 ('the Act'), subject to any agreement between the partners every partnership is dissolved upon the death of any partner. In *Khoo Yoke Wah & Ors v Lee Choo Yam Holdings Sdn Bhd & Ors* [1991] 1 MLJ 414, Gunn Chit Tuan SCJ qualified this provision by considering the agreement before he construed the partnership as having been dissolved. His Lordship approved the finding of the High Court judge that there was no evidence — either written or oral or to be inferred from the conduct of the surviving partners and the heirs of the deceased partners — to justify the conclusion that there was an agreement between the existing partners that the partnership should continue notwithstanding the death of the partner. On that finding of fact, his Lordship then concluded that the death of the partner in the absence of any agreement between them therefore dissolved that partnership. In the current case, not only is there no provision to continue the partnership, but the executors also refused to become partners. It was not a question of the executors wanting to become partners but were rebuffed, but a total rejection of the perpetuation of the firm by the executors when disagreeing to the defendant carrying on the firm with the same name of

TC Chong & Co as an ongoing concern. For reasons best known to the estate of the deceased, the latter did not take too kindly to a Chong's firm being run by a Lim resulting in this originating motion. A

The plaintiff canvassed that under common law, once a partnership has disintegrated, it will be unlawful for the surviving partner to carry on the business under the firm's original name. By virtue of cl 9 of the agreement signed by both of them, the surviving partner was also not entitled to receive any form of compensation out of the goodwill of the company. Why cl 9 was strenuously canvassed is beyond me but as much effort had been put into this issue, I will endeavour to come to some finding. The defendant, on the other hand, disputed the observations of the plaintiff and ventilated that the plaintiff had misinterpreted the common law principle and also cl 9. Counsel went one step further and delighted the court with the argument that even if common law prevented the use of the name of the firm by the surviving partner, the antiquity of that common law principle was vitiated by the provision of s 44 of the Act which envisaged some form of compensation for the estate of the deceased partner, in the event the business is still in subsistence. B C D

For the purposes of our case, the partnership agreement dated 30 December 1992 and the Act are highly relevant for my consideration before granting any particular order. Their relevancy were ably put by VC George J in *Tan Eng Choong v Foo Kai Yuen & Anor* [1988] 1 MLJ 531 at p 532 when he said: E

> A partnership is a contractual relationship which subsists between persons carrying on business in common with a view of profit. The mutual rights and duties of the partners may be set out in a partnership agreement or deed and if not are as provided in Pt IV of the Partnership Act 1961.

(See also *Keith Spicer Ltd v Mansell* [1970] 1 All ER 462). With that remark in mind, I have zeroed in on two provisions in that agreement for my consideration. They are cll 7 and 9 which read: F

> 7 Nett assets
>
> Forty per cent (40%) of the nett assets of the partnership as at 31 December 1992 shall be taken over by the junior partner at book value ... . G
>
> 9 Goodwill
>
> No goodwill shall be paid or payable by the junior partner who shall not have any claim of any goodwill if she ceases to be a partner. H

The applicant contended that by virtue of cl 9, as no goodwill was payable to the defendant, she should not be allowed to navigate around cl 9 and avoid or overcome the provision which was prejudicial to her interest by continuing to use the firm's name despite its dissolution. The defendant, on the other hand, denied the assertion of the applicant and contended that the factors involved prior to the signing of the agreement, read together with the agreement, permitted her to claim goodwill within the provision of cl 9. As the interpretation and views of both the parties were poles apart, it was encumbent upon me to scrutinize the evidence and to I

avoid interpreting cll 7 and 9 in isolation. It was not denied that the defendant had to pay RM79,699.22 as her contribution to join the firm, a sum which was equivalent to 40% of the nett assets of the firm. Even though the terminology of 'assets' is not exactly alien to the legal fraternity, in this instance, I believe it is proper that I have a correct glimpse of this term in relation to goodwill. *Jowitt's Dictionary of English Law* (2nd Ed) at p 145 reads:

> In accounting and business, assets are divided into current assets and fixed assets ... . Current assets comprise liquid (or quick) assets ... . Fixed assets comprise fixed tangible assets (eg, plant, buildings), fixed intangible assets (eg, goodwill) ... .

Resorting to *The Law of Partnership* by Charles D Drake, the writer at p 129 similarly endorsed the principle that goodwill is a partnership asset. Stirling J in *Jennings v Jennings* [1898] 1 Ch 378 at p 384 said:

> What the certificate speaks of is 'the assets' of the partnership; the goodwill is not expressly mentioned. It was not disputed that the word 'assets' includes the goodwill so far as it constitutes property; but it was contended that the defendant was not such a vendor as to give rise to the obligation to which the plaintiff's title to an injunction rests. Now the word 'assets' *is a compendious expression for the aggregate of the several items of property belonging to the partnership*. An agreement for the sale of such assets would in most cases bear the same construction and have the same effect as if the several items of property were specifically enumerated either in the body of the agreement or in a schedule annexed to it. (Emphasis added.)

Backed by the above authorities describing goodwill as part of the assets of the firm, it must mean that when she paid for the 40% of the assets of the firm, that payment had taken into account the then existing goodwill which was enmeshed with the said assets. As she had paid for the nett assets, then it must mean that she had paid for assets which were free of all liabilities. In the accounting world, it is no secret that assets mean capital (original investment plus retained profit plus goodwill) combined with liabilities. If I may rearrange, assets minus liabilities will result in capital. Therefore, nett assets is equated with capital.

Reading cl 9, I cannot avoid construing the clause to mean that she would not be entitled to claim any goodwill attained after 1 January 1993 in the event she ceased to become a partner. By that interpretation too, the defendant is not to be eligible to claim to any goodwill from the period of 1 January 1993 till the death of the senior partner in the event of her leaving the firm on her own accord, meaning that her rights dissipate if she were to step out on her own volition. As the facts revealed, she did none of this as the partnership was dissolved by an act of God. I do not see how she cannot claim the goodwill during her tenure as one of the partners when she had no hand in the unfortunate dissolution of the firm. I therefore conclude that as she had paid 40% of the nett assets of the firm — within which the goodwill is already enmeshed — she is thus entitled to claim not only her fair share but also the goodwill after 1 January 1993.

The next legal poser required to be considered is whether the defendant is entitled to continue using the name of TC Chong & Co after

the dissolution of the partnership pursuant to the provisions of the agreement. Having had a comprehensive perusal of the agreement, albeit badly drafted, I am unable to identify any provision which entitled the defendant to do so. On the other hand, neither did I find any provision that prevented her from so doing. Certainly, where a partnership has been dissolved by death, the surviving partner should not be restrained from carrying on whatever trade he pleases (*Anna Trego & William Wilson Smith v George Stratford Hunt* [1896] AC 7). What has upset the plaintiff is not the carrying on of a trade by the defendant, but the act of the defendant in continuing to use the old name. Mr TK Kee for the plaintiff laid the foundation of this legal issue by referring to the remarks of Romer J at p 383 of *Re an Arbitration between David and Matthews* [1899] 1 Ch 378, where his Lordship said:

> For example, though a surviving partner is within his rights in carrying on a similar or rival business, he could, in my opinion, be restrained from carrying on that rival business in the name of the partnership firm so as to lead to the belief that he was carrying on the partnership business, or so as otherwise to appropriate to himself the goodwill of that business.

This obiter was also referred to in a book written by Charles D Drake in *The Law of Partnership* at p 131 which reads:

> The corollary is that until such time as the partnership affairs are wound up, a partner (or his representative) who, without agreement to that end, carries on the same business under the partnership name may be restrained at the suit of his co-partners or their representatives.

Unfortunately, counsel stopped there. Reading the pages further the writer, on the other hand — without mincing his words when referring to *Scott v Rowland* (1872) 20 WR 508 — clarified that 'a partner must not use the name or property of the partnership to carry on business on his own account while a liquidation of partnership is pending in as much as it is his duty to do nothing to prejudice the saleable value of the partnership property until sale'. It does appear that the surviving partner may be prevented from carrying on the name of the partnership if by perpetuating it the saleable value of the partnership's property diminishes. For the purposes of the current case, I found absolutely no evidence adduced by the plaintiff to lead me to conclude that there was a diminution of the value of the assets of the firm by reason of the defendant's act.

In *Banks v Gibson* (1865) 34 Beav 566, one Mr Banks and Mr Gibson entered into a partnership called 'Banks & Co', which lasted for 15 years as manufacturers of pencils. It was agreed that on the death of either partner, the executors or administrators were to have the option of retiring from the business or to continue on with the business. In that case, Mr Banks had passed away earlier, resulting in a misunderstanding after the partnership was dissolved. After the assets had been divided equally, both the plaintiff and the defendant carried on the same business separately, with both using the same name. The plaintiff vide the administratrix of the late Mr Banks instituted a suit against Gibson restraining him from using the name of Banks & Co. The Master of the Rolls refused to grant the

application on the basis that as the partnership's assets had been split into two, then each was at liberty to use the name. His Lordship opined that had there been an arrangement which stipulated that the defendant was not to use the name, then the outcome would have been different. As it was, they had divided the partnership's property equally after its dissolution, leaving it wide open to them to enjoy in common the name or style of the firm. In this modern era in Malaysia, perhaps the Registrar of Business would not take too kindly to two business concerns running parallel to each other using the same name, but for the purposes of our case, the legal principle that has emanated is significant.

Banks v Gibson was discussed in *Burchell v Wilde* [1900] 1 Ch 551 and their Lordships watered down the effect of that case by agreeing to it, conditional on other partners not be exposed to any form of liability. Another legal precedent on point on this legal poser is the case of *Levy v Walker* (1879) 10 Ch 436 where their Lordships Jessel MR and James LJ, prior to quashing the injunction, made some especially pertinent comments as reflected in the *Arguments* section. Even though these comments were merely parts of the notes of proceedings, their opinion or stance became the legal basis of the judgment of the both of them. His Lordship James LJ confirmed the view as reflected at p 445 that in the event a partnership was dissolved, each partner — in the absence of agreement to the contrary — was entitled to use the name of the firm. Jessel MR went one step further by holding that a man could assume whatever name he pleased. My task would have been made much easier for the purposes of this application had some evidence been adduced for my consideration in that the act of the defendant had jeopardized the interest of the estate.

Apart from the three cases which rejected the contention of the applicant that a surviving partner is not to be allowed to continue using the old name, I also find s 44 of the Act illuminating. Section 44 of the Act reads:

> Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled, at the option of himself or his representatives, to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of eight per cent per annum on the amount of his share of the partnership assets ... .

As I read it, s 44 envisages a situation where prior to the settlement of account, ie before the winding up of the partnership, in the event the surviving partner carries on with that business using the same name, then that surviving partner has to account to the estate of the late partner giving it the option to a share of the profits or to pay an interest of 8% per annum on the amount of his share of the partnership assets.

Surely, if the plaintiff is right that the surviving partner is totally shut out from using the original name of the old partnership, s 44 would not have been promulgated. In fact, by its promulgation, Parliament has confirmed the right of a surviving partner to carry on using the old name,

subject to the requirements of this provision, inter alia, ensuring certain statutory protection to the estate in the form of monetary compensation. Section 44 too is no stranger to British law as it is in pari materia with s 42 of the English Partnership Act. This provision was applied in the case of *Manley v Sartori* [1926] All ER Rep 661, where the court held that the deceased partner's estate was entitled to claim such share of the profits as the court found attributable to his share of the partnership's assets. Having considered all these cases and s 44 of the Act, I find it incumbent upon me to reject the legal poser of the plaintiff.

Having perused the facts, I cannot avoid the inescapable conclusion that the rejection of this application led to no loss to the estate of the deceased partner. Similarly, even if the partnership were to be wound up, the effect to the estate would be minimal. Regarding the allegation of the plaintiff that the final accounting of the firm would pose some problems to the receiver so long as the firm is not discontinued, it is a non-starter as the receiver in his report called 'Receiver's Report on Dissolution of Partnership Firm TC Chong & Co' has denied it. Without any damning evidence, I must conclude that the act of the defendant has not eroded the value of the goodwill attached to the name of TC Chong but has instead maintained it. Financially, too, the estate will gain some monetary advantage by virtue of the provision of s 44. On the part of the defendant, she was not asking for any goodwill payment as mentioned in cl 9 but merely pursuing her rights to continue using the material name. She was more than willing to adequately pay any damages if ordered by the court (see *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 and *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408). In the process, she had done nothing negative to bring the firm's good name to disrepute either.

In contra distinction to the defendant's position if she were to close down the firm, her financial position would be harshly affected. If I may refer to the receiver's report, despite the usage of the old name — perhaps due to loyalty to the family of the deceased's partner — a substantial number of the regular clientele has already migrated to the deceased son's firm which, oddly enough, carries on a business under the style of TM Chong & Co. It is strange that the son, who is in the same line, refused to continue the steep tradition and expectation of the family by stepping into the vacuum by taking over the lion's share of the late father. Now all the perks, goodwill and ground work diligently built by his father will go to unnecessary waste. It is not for me here to speculate why the son has undertaken this course of action.

On the balance of convenience, after having considered the above factors I cannot detect any justification to grant this application and as such I dismiss prayer 6 of encl 2 with costs.

Application dismissed.

Reported by Zahid Taib